

Memorandum

To: Gayle Murphy and Alan Yochelson
From: Rick Sander, Bill Henderson and Doug Williams
Re: Our proposal to analyze California bar data
Date: November 19, 2006

As you know, the subcommittee considering our request met with representatives from California law schools in October, and heard objections from some schools concerning our proposed research and use of bar data. Over the past couple of weeks, we have done some brainstorming to consider ways in which our research group can address these concerns. This memo outlines our thoughts, and in our conversation Monday we are seeking your thoughts and reactions to these strategies and other suggestions you may have. The memo is organized around five possible objections that we gather were raised at the October meeting.

- I. Fairness concerns. Some law schools have questioned whether our research team is balanced and fair, or whether it is driven by an agenda to undermine affirmative action programs at California law schools. We think there are several possible ways to respond constructively to this concern:
 - A. We can provide more information on our research records. All four of us on the research team have very pure records of doing highly-respected, non-partisan research. With all four of us, our research has been consistently informed by the goal of improving access and outcomes for minorities. Bill Henderson is best known for a path-breaking article, published in the *Texas Law Review*, that questions the efficacy of the LSAT and considers whether an overly heavy reliance on the LSAT may have unfair, disparate impacts upon minorities. Many liberals have made similar critiques, but Bill's work is one of the few that backed up his critique with innovative and fair empirical work. One of Rick Sander's best known works is an extensive study of how academic support programs work in law school, and how they can be modified to best improve outcomes for struggling students. If one looks at our records closely, it's simply not plausible to argue that either of us have a conservative or exclusionary agenda.
 - B. We can pledge to submit our analysis of the data to a respected, peer-reviewed journal. In point of fact, the *Journal of Empirical Legal Studies* (JELS) has heard about this proposed study and has invited us to submit the manuscript to them. JELS is arguably the most respected journal in its field. It is edited by Ted Eisenberg of Cornell and several co-editors who are considered among the best legal empiricists in the world. We would propose that we submit the article to JELS (or a comparable journal) and promise not to release any results until the journal has completed its peer-review and accepted the piece. The peer-review promise helps to ensure that any conclusions based on inadequate data or unsound analyses are eliminated. Publishing the results in JELS, and using the peer-review process, would tend to immunize the California bar from any criticism for making the data available.

- C. A third possibility – one which might or might not be feasible to implement – would broaden our research team. Dean Bryant Garth of Southwestern suggested that including someone on the team who is both respected and perceived to be skeptical about the mismatch hypothesis. Of course, many factors influence whether a given scholar can be an effective coauthor with several other scholars, so if we went this route we would be concerned to select someone with whom we could work effectively. Nonetheless, we are actively evaluating some possibilities.
 - D. It's also important for the Committee to know that we are actively seeking input on our study design from a wide range of legal empiricists, including several of those who have written critiques of Sander's earlier article on law school preferences. We are committed to making our research as transparent as possible, and to testing our hypotheses in every reasonable way.
- II. Access to information. Another objection raised by some law schools is this: if the Klein/Sander/Henderson/Williams team is granted access to this data, shouldn't the data be made generally available?
- A. As a starting point, we want to make clear that we have no objection to the data being released in any form. We assumed that the Bar would like to maintain as much control of the data as possible, and we structured our original proposal – in which Klein and Bolus do the data analysis – to fit with this constraint. We view our proposal as essentially a continuation of the Bar's long commitment to careful research aimed at better understanding the factors that determine success on the bar, and furthering the goal of making the process of becoming a lawyer in California as fair to all racial groups as possible.
 - B. We see three ways the Bar could provide greater accessibility to other uses of the Bar data without taking the step of general public release:
 - 1) One approach would be to proceed with the current plan. Once our peer-reviewed analysis of the data has been published, other researchers would assemble their own proposals involving Drs. Klein and Bolus, just as we have, and the Bar could consider those.
 - 2) The second and third approaches would both start with the formation of an independent, credible research group that would evaluate research proposals involving the use of this data. Again, we believe that the editorial group at the Journal of Empirical Legal Studies (JELS) would be ideal for this role – a highly distinguished, completely independent and completely nonpartisan association that could evaluate research requests. We have discussed with JELS the possibility of playing such a role, and they have been willing to consider it seriously.
 - 3) Under the "second" approach, Klein and Bolus (i.e., the Bar) would retain

exclusive custody of the data, but would perform analyses that, in the opinion of the JELS committee, had significant scholarly merit. Thus, for example, someone who wished to critique one of our research findings would propose a new analysis of the data. If JELS considered the proposal substantively promising, and the researchers had the funds to pay Klein and Bolus to conduct the analysis, then the analysis would move forward.

- 4) Under the “third” approach, the Bar would turn a version of the California data over to the JELS panel (with identifiers removed). JELS would evaluate proposals for the use of the data, and those whose proposals were considered substantively promising, and who had appropriate “human subjects” authorizations from their institutions and who signed appropriate agreements regarding the use of the data, would be given copies of the data for a specified period of time (e.g., six to twelve months). This is the approach that is used with many large databases that are potentially important in addressing public policy questions. For example, the Mellon Foundation in New York uses this type of process in making available its large “College and Beyond” database, which has detailed longitudinal data on tens of thousands of college students.

III. Confidentiality of test-takers. A third general concern is that the research could affect the confidentiality of information about individual test-takers. This is an easy concern to address.

- A. First, our current research proposal maintains the data in the hands of Drs. Klein and Bolus. Analyses of this data will always be at the group or aggregate level, so nothing sent by Klein and Bolus to the other principal researchers could ever disclose individual identities.
- B. Second, we are required as researchers to secure the approval of our school’s Human Subject Protection Committee for research involving individual-level data. These committees arose nationally during the 1970s and 1980s to both guarantee high ethical standards in research and to protect universities from potential liability from the conduct of research. They take their mission very seriously, and have elaborate protections they require faculty to follow, with the protections tailored to the types of confidentiality issues that could arise in each particular type of research.
- C. Third, if the data were to be released to JELS or some similar panel, with the potential for outside researchers directly using the data, some fairly simple protocols would make it extremely unlikely that any individual’s identity could be deduced (even by a researcher willing to breach his contractual agreement and the Human Subjects protocols of his university to search for individual identities). These include: (a) deleting all direct individual identifiers (e.g., SSN); (b) replacing school names with a code and with general information on the characteristics of the school; and (c) deleting racial identifiers within individual schools for any group with four or fewer members in a particular class.

- IV. Confidentiality of school identity. A fourth concern is that individual schools will be identified in the research, or that schools should be able to veto projects that make use of data they have supplied in the past to the Bar.
- A. One of these concerns is very easy to address. *We will not identify individual schools in any of our published work, period.* One of the strengths of the California data is the large number of law schools in the state. This makes it possible to discuss different types of schools (e.g., elite vs. non-elite, ABA-approved vs. state-approved) without giving away the identity of an individual school.
 - B. Providing a veto to individual law schools seems to us more problematic. The research we propose is very similar to the types of research the Bar has commissioned in the past. The results of these past studies are made available to interested members of the public. We do not see why this study should be treated differently. That said, one way of addressing the concern would be to give individual law schools a window of time (e.g., thirty days) during which they could notify the Bar that they do not wish data they have provided in the past to be used in this study. We think it unlikely that many schools would take the Bar up on this offer.
- V. General support for this research. A final issue raised by Gayle is whether there is really a constituency interested in this research beyond our own research team. This might be paraphrased as, “If even a few of the California law schools have concerns about this research, what weight is there on the other side that should lead us to permit it?” Several observations are relevant:
- A. Over the past decade, no other research or policy debate relating to the bar has generated as much national discussion as the possible existence of a serious mismatch effect. It directly concerns access of minorities to the legal profession as well as continuing debates about the effects of Proposition 209 in California and the desirability of other, similar restrictions in other states. Nearly all of the researchers who have critiqued the mismatch theory have called for more and better data to help resolve the debate.
 - B. The United States Civil Rights Commission held hearings this past June specifically on the mismatch effect. The strong consensus of the Commission was that better data, including bar data, would be important in advancing the nation’s understanding of these issues, and that law schools may be engaged in fundamental violations of civil rights laws and principles. Members of the Commission have followed closely subsequent research in this area and are aware that the California bar is considering this request.
 - C. Many law school faculty and deans are also aware of the debate and the importance of further research. We have little doubt that if we could gather all the faculty and deans of California law schools together for a discussion of this issue, a large majority would favor the use of this data to better understand the mismatch effect.